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1 Lloyd Enterprises, Inc. Respondent agency was represented by it
2 legal counsel Keith D. McGoffin.

3 Witnesses were sworn and testified. Exhibits were admitted and
4 examined. Argument was heard. From the testimony, evidence, and
5 contentions of the parties, the Board makes these

6 FINDINGS OF FACT

7 I

8 Respondent, Puget Sound Air Pollution Control Agency (PSAPCA), is
9 a municipal corporation with authority to conduct a program of air
10 pollution prevention and control within the area of its jurisdiction.
11 That area includes the site of the event under appeal.

12 PSAPCA, pursuant to RCW 43.21B.260, has filed with the Board a
13 certified copy of its regulations and all amendments to them. We take
14 official notice of these regulations.

15 II

16 Appellant, Lloyd Enterprises, Inc., operates a gravel pit on a
17 site about 80 acres in size in Auburn, Washington. Over time, land
18 clearing has been conducted on this site to accommodate the gravel
19 operation. Occasionally, the company engages in off-site demolition
20 work.

21 III

22 On May 4, 1985, at about 5:00 p.m., the Auburn Fire Department was
23 contacted regarding what was reported as a brush fire west of the
24 Auburn Police Firing Range. Captain Robert S. Wigley responded with a
25 fire suppression crew. He located the fire on appellant's property in

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1 the north center part of the gravel pit. The fire was very large,
2 very hot, and very smokey. It contained the debris of a demolished
3 house, including tar paper, scrap lumber, wiring, aerosol cans,
4 plumbing pipe, a rubber tire, an old toaster and general rubbish. It
5 also contained natural vegetation from land clearing. The fire
6 appeared to have burned a long time. The firemen put it out.

7 IV

8 At some point, Robert Lloyd, appellant's president, arrived on the
9 scene and engaged in heated debate with the fire department
10 authorities. Captain Wigley summoned Fire Marshal Dave Fugit and he
11 arrived at the site at approximately 6:00 p.m. His observations of
12 the size, character and contents of the fire were essentially the same
13 as Wigley's.

14 V

15 PSAPCA's inspector was advised of this incident by letter from the
16 Auburn Fire Department. He thereupon issued two Notices of Violation
17 to appellant, one for burning materials prohibited in an outdoor fire
18 and one for conducting a fire other than a land clearing or
19 residential fire without prior written approval. On July 16, 1985,
20 the agency issued to appellant a Notice and Order of Civil Penalty
21 relating to the fire on May 4.

22 The Board received appellant's appeal on August 13, 1985.

23 VI

24 Appellant's representative at the hearing did not contest the fact
25 of the fire or that it contained the materials described by the fire

1 department officials. He advised that the fire contained the remnants
2 of an old house which had been pulled down earlier in the week at a
3 site more than a mile from the gravel pit. The debris had been hauled
4 into the burn site in several truck loads. He said the burn site had
5 been used for years mostly to burn land clearing debris from clearing
6 operations necessary for the expanding gravel pit.

7 VII

8 Lloyd Enterprises, Inc. was issued a Population Density
9 Verification (PDV) on April 26, 1984, for the site in question. This
10 document verified the population density within .6 of a mile as less
11 than 2,500 persons. In such an area, land clearing burning, as
12 defined, may be conducted under PSAPCA's rules without further
13 approval from the agency. However, a separate individual permit must
14 be obtained from PSAPCA if the burning does not fall within the
15 specified definitional terms.

16 The PDVs issued by PSAPCA are valid for a year from the date of
17 issuance. The event at issue occurred after Lloyd Enterprises' PDV
18 had expired. The company obtained a new PDV for the site on May 23,
19 1985.

20 PSAPCA's chief enforcement officer testified that with every PDV
21 mailed out, the agency encloses its applicable open burning
22 regulations.

23 VIII

24 The PDVs issued here plainly stated the following condition:

25
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1 The outdoor fire must not contain any material
2 other than the trees, stumps, shrubbery or other
3 natural vegetation which grew on the property being
4 cleared. Section 1.07(y) and Section 8.02.

5 Further, they advised that any violation of Regulation I is
6 subject to enforcement action, including civil penalties. The forms
7 were signed by representatives for the company, who in doing so
8 certified that they would comply with PSAPCA's regulations.

9 IX

10 In 1975, appellant doing business as Lloyd's of Washington, Inc.,
11 appealed a civil penalty for alleged unlawful open burning. After a
12 hearing before this Board, the penalty was vacated because appellant
13 was held to have justifiably relied on the fire marshal's assurance
14 that the burning was proper. The opinion, however, advised appellant
15 of PSAPCA's land clearing burning regulations. Lloyd's of Washington
16 v. PSAPCA, PCHB 868 and 869 (October 3, 1975).

17 In 1976, appellant doing business as Lloyd's of Washington, Inc.
18 appealed multiple civil penalties relating to open burning. Thirteen
19 of fourteen violations asserted were affirmed. Lloyd's of Washington
20 v. PSAPCA, PCHB 1116 (May 23, 1977).

21 X

22 Any Conclusion of Law which is deemed a Finding of Fact is hereby
23 adopted as such.

24 From these Findings of Fact, the Board comes to these

25
26 Final Findings of Fact,
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1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over these persons and these matters.
4 Chapters 43.21B and 70.94 RCW

5 II

6 RCW 70.94.740 states, in pertinent part:

7 It is the policy of the state to achieve and
8 maintain high levels of air quality and to this end
9 to minimize to the greatest extent reasonably
10 possible the burning of outdoor fires. Consistent
11 with this policy, the legislature declares that
12 such fires should be allowed only on a limited
13 basis under strict regulation and close control.

14 RCW 70.94.775 states, in pertinent part:

15 No person shall cause or allow any outdoor fire:

16 (1) containing garbage, dead animals, asphalt,
17 petroleum products, paints, rubber products,
18 plastics, or any substance other than natural
19 vegetation which emits dense smoke or
20 obnoxious odors . . .

21 III

22 Section 8.02 of PSAPCA Regulation I, entitled "Prohibited Outdoor
23 Fires" states in pertinent part:

24 It shall be unlawful for any person to cause
25 or allow any outdoor fire: . . .

26 (3) containing garbage, dead animals, asphalt,
27 petroleum products, paints, rubber products,
28 plastics, or any substance other than natural
29 vegetation which normally emits dense smoke or
30 obnoxious odors; or

31 (4) for the purpose of demolition, salvage or
32 reclamation of materials; or

33 . . .

1 Section 8.05 of Regulation I entitled "Other Burning" states in
2 pertinent part:

3 It shall be unlawful for any person to cause
4 or allow any outdoor fire other than land clearing
5 burning or residential burning except under the
6 following conditions:

7 (1) Prior written approval has been issued by
8 the Control Officer or Board; and

9 (2) Burning is conducted at such times and
10 under such conditions as may be established by the
11 Control Officer or Board.

12 Section 1.07 contains the following definitions:

13 (g) "Land clearing burning" means outdoor fires
14 consisting of residue of a natural character such
15 as trees, stumps, shrubbery or other natural
16 vegetation arising from land clearing projects and
17 burned on the lands on which the material
18 originated. (Emphasis added).

19 (pp) "Residential burning" means small outdoor
20 fires consisting of leaves, clippings, prunings and
21 wood, so large as it has not been treated by an
22 application of prohibitive material or substances,
23 and other yard and gardening refuse originating on
24 lands immediately adjacent and in close proximity
25 to a human dwelling and burned on such lands by the
26 property owner or his designee.

27 IV

The fire which occurred on May 4, 1985, was neither "land clearing
burning" nor "residential burning" as those terms are defined in
Regulation I. Therefore, we conclude that the fire violated Section
8.05 which requires a permit for open burning which does not meet
these definitions.

V

Even if an effective PDV had been in existence for the site on the

1 date of the fire, the result would be the same. A PDV is not
2 strictly speaking, a permit. Rather, it is verification that a
3 certain state of facts exists in a particular area. Where such facts
4 (low population density) are verified, "land clearing burning" is
5 authorized. However, neither the nearby population nor the issuance
6 of a PDV have any bearing on a fire which is not "land clearing
7 burning" as defined.

8 VI

9 We conclude, further, that the fire violated Section 8.02.
10 Prohibited materials as listed in subsection (3) of that section were
11 present in the blaze. In addition, it was part of a demolition
12 project.

13 VII

14 RCW 70.94.431 authorizes a civil penalty "in an amount not to
15 exceed one thousand dollars per day for each violation" of any of the
16 rules and regulations of an air pollution control agency. "Each such
17 violation shall be a separate and distinct offense. . . ."

18 Since the regulations were violated, a civil penalty was clearly
19 lawful in this case.

20 VIII

21 Appellant objected to being "penalized twice for the same
22 offense." His objection is misconceived. The offenses asserted are
23 distinct and separate.

24 The vice under Section 8.05 is hauling material in from another
25 site to burn. (This is not the type of burning which is authorized by

1 definition. It requires a separate PSAPCA permit.) The vice under
2 Section 8.02 relates to the nature of the materials burned.

3 Thus, the violations charged related to different conduct, and are
4 not multiple offenses relating to the identical action.

5 IX

6 PSAPCA has not distinguished between these distinct offenses for
7 the purposes of its penalty assessment. It is not necessary to do
8 so. In light of all the facts and circumstances, we do not believe
9 the amount of penalty is unreasonable for either of the offenses taken
10 singly. The fire was substantial; the violations were deliberate and
11 obvious. Appellant has had prior experience with PSAPCA's Regulation
12 I as it relates to outdoor burning and should have known better.

13 X


14 Any Finding of Fact which is deemed a Conclusion of Law is hereby
15 adopted as such.

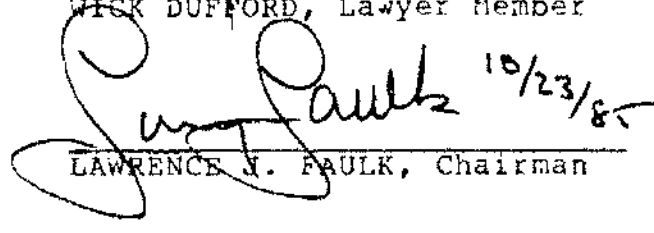
16 From these Conclusions of Law, the Board enters this
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ORDER

The Notice and Order of Civil Penalty (No. 6293) is affirmed.
DONE this 23rd day of October, 1985.

POLLUTION CONTROL HEARINGS BOARD


NICK DUFFORD, Lawyer Member

 10/23/85
LAWRENCE J. FAULK, Chairman